A US PERSPECTIVE ON STANDARD SETTING POLICY

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(views below are solely attributable to the author, not officials views of FTC or any FTC Commissioner)

Introduction

- I fully agree with all the points made by Gerry Masoudi (see http://www.usdoj.gov/atr/public/speeches/220972.htm).
- I also generally endorse the insights ably set forth by Anthony Whelan. To be provocative, however, I will note a few minor points where there appear to be differences in emphasis between the American and European approaches to antitrust enforcement in this complicated area.
- These two excellent presentations highlight somewhat different philosophical “takes” on the complexities of IP-related standard-setting and licensing. I for one am hopeful that these different takes over time can be reconciled, given European and American antitrust enforcers’ common dedication to promoting competition and consumer welfare.

USG Does Not Support Guidelines

- The U.S. federal antitrust enforcement agencies have not proposed antitrust guidelines or standards for use by standard-setting organizations, or SSOs, in setting basic operating rules, and, in particular, IP disclosure-related rules. Why is this? After all, those agencies have issued guidelines on antitrust issues arising in IP licensing, mergers, competitor collaborations, and health care.
- The reason is simple. Existing U.S. antitrust guidelines focus on identifying behavior by competitors, acting individually or in tandem, that might violate the antitrust laws, properly interpreted. Specifically, those guidelines emphasize that the federal antitrust agencies are concerned about conduct that is likely to undermine the competitive process and harm consumer welfare. Those guidelines provide some safe harbors, but they do not seek to direct competitors to undertake particular competitive arrangements.

Problems with Guidelines

- By contrast, SSO guidelines would tend to shape the nature of the interaction among competitors in standard-setting bodies. As such, SSO guidelines would involve government in shaping the nature of standard-setting decisionmaking.
- SSO guidelines would leave unaddressed the question of whether particular standard-setting practices – including disclosure and ex ante licensing practices – are anticompetitive.
- It is certainly possible that, in particular circumstances, SSOs might decide that *not* having a disclosure rule would encourage a high degree of participation in SSO activities and might encourage the best technical standard to be adopted thereby.
- Government-mandated SSO guidelines that prompted the adoption of disclosure rules would prevent such an outcome. In short, those guidelines would be regulatory and prescriptive in nature, at odds with the American antitrust tradition of leaving business arrangements to private parties to work out, subject only to government prosecution when particular conduct is found to diminish competitive forces. They would create a "one size fits all" environment that would not be responsive to particular facts and would thus tend to undermine competitive freedom and flexibility.

DG Comp ETSI Investigation

- I mention my concern about government-mandated guidelines not as a critique of specific DG-Comp policy. Indeed, DG-Comp has not promulgated SSO guidelines. But I would note questions raised by one specific matter that DG-Comp closed and cited in a press release.
- Specifically, in December 2005 DG-Comp closed its investigation of ETSI following ETSI's decision to change its standard-setting rules. The changes strengthened the requirement for early disclosure of those IPRs that are essential for implementation of a standard in order to minimize the risk of patent ambush. The press release stated that DG-Comp had been concerned that ETSI's former rules did not sufficiently protect against the risk of patent ambush during ETSI standard-setting procedures.

ETSI Investigation, Continued

- When the ETSI investigation closed, Commissioner Kroes said that "it is crucial that standard-setting bodies establish rules which ensure fair, transparent procedures and early disclosure of relevant intellectual property. We will continue to monitor the operation of standard-setting bodies in this regard."
- DG-Comp's press release also noted that ETSI had established a group to examine possible further changes to ETSI's standard-setting rules, in particular on the issue of ex ante licensing (where loyalties are set or discussed before a standard is agreed upon).
- Stressing that the Commission's Article 81 Guidelines on Technology Transfer Agreements state that such ex ante licensing can have procompetitive benefits when subject to appropriate safeguards, the press release closed by stressing that the Commission will therefore follow ETSI's forthcoming discussions with interest.

USG Views on SSO Procedures

- The U.S. federal antitrust enforcement agencies recognize that ex ante licensing negotiations may be efficiency-enhancing and procompetitive, if subject to appropriate antitrust safeguards. See September 2005 speech by FTC Chairman Majoras and October 2006 VITA business review letter by AAG Barnett.
- And the US agencies also recognize that it is possible that an SSO may promote anticompetitive exclusionary behavior when it operates pursuant to procedures that are not fair and transparent – see *Allied Tube*.
- But the US agencies do not believe it is their role to see to it that SSOs adopt particular procedures that the government deems fair or desirable – including procedures on ex ante licensing and on revealing IPR early to prevent patent ambush. As explained above, although such procedures may be desirable in many circumstances, that is not necessarily the case.

SSO Discretion is Key

- An SSO may decide that it will achieve the best form of active participation by businesses if it does not mandate that IPRs be revealed early on and if it does not enter into ex ante negotiations.
- For example, ex ante negotiations and mandatory early IPR revelations might chill SSO involvement by key property rights holders and might distract SSO members from focusing on substantive technical issues. The fact that IPR holders will have to interact with each other in the future in “repeat games” may be sufficient to deter holdup.
- Alternatively, SSO members may decide that they want to focus solely on technical questions to get the best standard in place and are willing to absorb the risk that they may have to pay relatively high future royalties.

SSO Discretion, Continued

- Of course, an SSO may decide that mandatory early disclosure and ex ante negotiations are best.
- BUT THE SSO, NOT GOVERNMENT, IS BEST SITUATED TO MAKE THAT DECISION. ANY CONCLUSION TO THE CONTRARY RISKS EXCESSIVE GOVERNMENT MICROMANAGEMENT OF INDUSTRY, WITH RESULTING COSTS TO GROWTH AND INNOVATION.
- Government should focus on taking enforcement actions against anticompetitive conduct, based on a clear industry understanding of government policies reflected in public statements and in guidelines, and leave it at that.

DG Comp and SSO Discretion

- I am not claiming that DG Comp necessarily would disagree with this proposition. Indeed, it is my hope that European antitrust officials would endorse this “take” on how to approach SSO decisions.
- Perhaps future DG Comp statements on this topic will prove helpful.

Common US and EU Concerns

- I have a few additional specific comments to make on Anthony's fine presentation.
- We, like the Europeans, are concerned with both anticompetitive collusion and exclusion. Supreme Court cases like *Allied Tube* and *Hydrolevel* highlight the possible abuse of standard setting to achieve anticompetitive exclusion.
- We also are concerned with both allocative and dynamic efficiency, while noting that the welfare benefits of dynamic efficiency are greatest. In evaluating the state of competition, we also focus on competition among standards, whether de facto individual firm standards or de jure SSO norms.

EU-US Differences in Tone

- Now for a bit of nit-picking that highlights US-EU differences in tone.
- I would not require that a standard-setting body's restrictions be evaluated under an "indispensability" standard, which requires second-guessing of conditions that may be needed to render efficient SSO cooperation effective.
- Rather, I would focus on whether any particular SSO restrictions unnecessarily limit competition more than needed to achieve the SSO's benefits. Thus, for example, applying the DOJ-FTC 1995 IP Licensing Guidelines, I would be particularly concerned about unnecessary restrictions on the competition among SSO members in technology and product markets.

Differences in Tone, Continued

- Anthony also stated that enforcement of valid IPRs is normally procompetitive and subject to EC intervention only in exceptional circumstances, citing Magill and IMS.
- I would argue that legitimate enforcement of IPRs – that is, enforcement not accompanied by exclusionary conduct, such as deception of an SSO – should never be the subject of intervention. The risk of such intervention chills incentives to innovate.

Differences in Tone, Continued

- Anthony also noted that one goal of antitrust policy is to minimize the risk that the consumer will pay more than is economically efficient. I would phrase this somewhat differently, stating that enforcers should proscribe anticompetitive inefficient conduct that reduces output and raises price.
- For example, it should not be grounds for antitrust concern if an SSO knowingly agrees to a standard that reads on patents with the understanding that IP holders will charge licensing fees that reflect some degree of market power. Such an arrangement may advance dynamic efficiency by encouraging innovation, even though downstream pricing to consumers is above MC.

Clear Rules and SSO Autonomy

- My final nit is not really a critique of a point Anthony directly made, but rather an observation of DG-Comp support for SSO policy guidance, derived from Anthony's sensible comment about encouraging SSOs to have clear rules.
- Certainly clear rules, as a general proposition, reduce uncertainty and may enhance competition. But, as I explained in my initial remarks, I believe that SSO bodies themselves, rather than government, should decide what rules are appropriate.

Conclusion

- Thank you very much for your attention.